

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
2 Including Professional Corporations
MOE KESHAVARZI, Cal. Bar No. 223759
3 A. ALEXANDER KULJIS, Cal. Bar No. 299951
333 South Hope Street, 43rd Floor
4 Los Angeles, California 90071-1422
Telephone: 213.620.1780
5 Facsimile: 213.620.1398
E mail mkeshavarzi@sheppardmullin.com
6 akuljis@sheppardmullin.com

7 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
8 Including Professional Corporations
JOHN T. BROOKS, Cal. Bar No. 167793
9 501 West Broadway, 19th Floor
San Diego, California 92101-3598
10 Telephone: 619.338.6500
Facsimile: 619.234.3815
11 Email: jbrooks@sheppardmullin.com

12 Attorneys for Defendant
KAISER FOUNDATION HEALTH PLAN, INC.

14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

16 GRACE SMITH and RUSSELL
17 RAWLINGS, on behalf of themselves and
all others similarly situated, and
18 CALIFORNIA FOUNDATION FOR
INDEPENDENT LIVING CENTERS, a
California nonprofit corporation,

19 Plaintiffs,

20 v.

21 MARY WATANABE, in her capacity as
22 Director of the California Department of
Managed Health Care; CALIFORNIA
23 DEPARTMENT OF MANAGED
HEALTH CARE; and KAISER
24 FOUNDATION HEALTH PLAN, INC.,

25 Defendants.

Case No. 4:21-cv-07872-HSG

**DEFENDANT KAISER FOUNDATION
HEALTH PLAN, INC.'S REPLY IN
SUPPORT OF MOTION TO COMPEL
ARBITRATION**

Date: April 28, 2022
Time: 2:00 p.m.
Room: 2
Judge: Hon. Haywood S. Gilliam, Jr.

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I.

INTRODUCTION

Plaintiffs do not dispute that the FAA creates a strong presumption in favor of enforcing agreements to arbitrate, and none of the arguments Plaintiffs raise overcome this presumption.

First, Plaintiffs fail to carry their high burden of showing that Congress exempted Section 1557 claims from arbitration. Indeed, even Plaintiffs do not contend that anything in the Affordable Care Act or any other federal statute evidences such a Congressional intent. Instead, Plaintiffs merely argue that arbitration is somehow inherently inconsistent with the vindication of Section 1557 rights. But Plaintiffs fail to show that there is anything about a claim for discrimination that makes it unsuitable for resolution in arbitration. Their arguments boil down to factually and legally unfounded attacks on the efficacy or fairness of arbitration. The Court should reject these attempts to evade the parties' agreements and the FAA.

Second, Plaintiffs fail to show that the arbitration agreement is unconscionable. The agreements here are neither procedurally or substantively unconscionable, much less both. Plaintiffs' claims that the available arbitrators—which include many retired judges—are somehow incompetent to resolve statutory disputes or biased in Kaiser's favor are unsupported by a shred of evidence. And their claims that the arbitration agreement requires them to give up important remedies are simply wrong.

Third, Plaintiffs fail to show that their ERISA claim is exempt from arbitration. Contrary to Plaintiffs' argument, the Department of Labor's claim process regulation does not preclude arbitration because the regulation applies only to appeals of adverse benefit determinations—that is, where a claim is denied because of a dispute about whether the contract as written entitles the member to a given benefit. The DOL regulation does not apply to claims like Plaintiffs'—where Plaintiffs *admit* that they have no contractual right to wheelchair benefits above \$2,000 and instead challenge that benefit *design* as illegal.

1 Because Plaintiffs have not overcome the FAA’s strong presumption in favor of
 2 arbitration, the Court should enforce the parties’ arbitration agreement. Further, it should
 3 do so on an individual, non-class basis because there is no clear, express intent to arbitrate
 4 class claims as required by U.S. Supreme Court law. Finally, the Court should stay the
 5 litigation in its entirety, including Plaintiffs’ claims against the DMHC, until the arbitration
 6 is completed because parallel litigation would result in duplicated efforts and risk
 7 inconsistent rulings on overlapping issues.

8 II.

9 **THE COURT SHOULD COMPEL ARBITRATION**

10 **A. The FAA Applies to Plaintiffs’ Section 1557 Claim**

11 Congress enacted the FAA to reverse the historical “hostility of American courts to
 12 the enforcement of arbitration agreements[.]” *Circuit City Stores v. Adams*, 532 U.S. 105,
 13 111 (2001). Since the enactment of the FAA, courts reject “generalized attacks on
 14 arbitration that rest on ‘suspicion of arbitration’” even where the underlying statutory
 15 claims are designed to forward important social policies. *Green Tree Fin. Corporation-
 16 Alabama v. Randolph*, 531 U.S. 79, 89-90 (2000).

17 Plaintiffs’ lead argument is that the FAA doesn’t apply to the claim under Section
 18 1557 of the Affordable Care Act (“ACA”). But they do not dispute that their arbitration
 19 agreements as a whole are governed by the FAA, and they expressly concede that the
 20 agreements affect interstate commerce. (*See Opp.* (ECF 37) at 4-5.) Instead, Plaintiffs try
 21 to avoid arbitration of their Section 1557 claim by invoking the “doctrine of contrary
 22 congressional intent.”

23 Plaintiffs have the burden to show that Congress intended to preclude arbitration of
 24 Section 1557 claims. *Shearson/American Express v. McMahon*, 482 U.S. 220, 226-27
 25 (1987). Such intent must appear in the statute’s text or the legislative history or, at a
 26 minimum, Plaintiffs must show an “inherent conflict” between arbitration and Section
 27 1557’s underlying purposes. *See id.* at 227. Further, any “questions of arbitrability must
 28 be addressed with a healthy regard for the federal policy favoring arbitration.” *Gilmer v.*

1 *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Moses H. Cone Memorial*
 2 *Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983)).

3 Plaintiffs do not and cannot carry their high burden. Plaintiffs cite nothing in text of
 4 the ACA or its legislative history that remotely suggests that Congress intended to exempt
 5 Section 1557 claims from arbitration. Nor do Plaintiffs cite a single case invalidating an
 6 arbitration agreement under the doctrine of contrary congressional intent with respect to
 7 any federal statute, including Section 1557 or otherwise. To the contrary, every case they
 8 cite *rejects* a party's appeal to that doctrine, which shows how high the burden is.¹

9 Unable to cite any express indication of Congressional intent, Plaintiffs resort to
 10 arguing a supposed inherent conflict between arbitration and Section 1557's "underlying
 11 purposes." But plaintiffs fail to identify any such conflict. Certainly, there is nothing
 12 about statutory claims in general that makes them unsuited to arbitration. As the Supreme
 13 Court recognized, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the
 14 substantive rights afforded by the statute; it only submits to their resolution in an arbitral,
 15 rather than a judicial, forum." *Mitsubishi*, 473 U.S. at 628.

16 Nor is there anything about statutory discrimination claims in particular that makes
 17 them unsuitable for arbitration. To the contrary, courts have repeatedly compelled
 18 arbitration of disability discrimination claims brought under the statutes referenced by
 19 Section 1557. *See, e.g., Bercovitch v. Baldwin Sch.*, 133 F.3d 141, 151 n. 11 (1st Cir.
 20 1998) (holding plaintiffs must submit their ADA and Rehabilitation Act claims to
 21 arbitration: "Nothing in the Rehabilitation Act evidences a Congressional intent to
 22 preclude arbitration, even assuming *dubitante* that the Rehabilitation Act provides
 23 jurisdiction here."); *Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215, 218 (5th Cir.

24
 25 ¹ *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 640 (1985)
 26 (holding antitrust claims under Sherman Act were arbitrable); *McMahon*, 482 U.S. at
 27 238, 242 (1987) (holding Securities Exchange Act and RICO claims were arbitrable);
 28 *Gilmer*, 500 U.S. at 35 (1991) (holding claim under Age Discrimination in Employment
 Act was arbitrable); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238-39
 (2013) (holding antitrust claims under Sherman Act seeking treble damages were
 arbitrable).

1 1997) (holding ADA claim was subject to arbitration in part because the text of the statute
2 “demonstrates Congress did not intend to exclude the ADA from the scope of the FAA.”).

3 The Supreme Court’s decision in *Gilmer* is on point. *Gilmer* analyzed whether
4 arbitration was consistent with the statutory framework and purpose of the Age
5 Discrimination in Employment Act (“ADEA”). *Gilmer*, 500 U.S. at 26-27. The Court
6 held that no inconsistency existed between combatting discrimination and enforcing
7 arbitration agreements. *Id.* The Court further held that generalized attacks on the efficacy
8 of arbitration—including arguments resting on “suspicion of arbitration as a method of
9 weakening the protections afforded in the substantive law”—are insufficient to overcome
10 the FAA’s policy favoring arbitration. *Id.* at 30.²

11 Plaintiffs’ arguments here boil down to the sort of “suspicion of arbitration” *Gilmer*
12 held to be insufficient to avoid the FAA. *First*, Plaintiffs suggest the cards are stacked
13 against them because the arbitration rules were “created and designed by Kaiser.”
14 (Opposition (ECF 37) at 6.) But the important rules are the statutory rules and evidentiary
15 rules, none of which were created by Kaiser. And in any event, there is nothing unusual in
16 the arbitration agreement—which was reviewed and approved by the DMHC (*see* Cal.
17 Health and Safety Code section 1351(f))—evinced a bias in Kaiser’s favor. Nor do the
18 actual *results* of arbitration suggest bias. To the contrary, in 2020 nearly half (46%) of
19 claimants in arbitrations against Kaiser received compensation either through settlement or
20

21 ² Plaintiffs’ attempts to distinguish *Gilmer* lack merit. *Gilmer* did not base its decision on
22 the fact that the ADEA creates a separate, independent forum for adjudicating claims, or
23 on the fact that the ADEA requires administrative exhaustion before a plaintiff can bring
24 a claim. To the contrary, it was the *plaintiff* in *Gilmer* who raised these attributes of the
25 ADEA in an (unsuccessful) effort to avoid arbitration, arguing that permitting private
26 arbitration would undermine statutory administrative enforcement procedures (e.g., the
27 requirement to file charges with the EEOC before filing suit). *Gilmer*, 500 U.S. at 28-29.
28 But the Court rejected that attempt to end-run the FAA, reasoning that “the mere
involvement of an administrative agency in the enforcement of the statute is not
sufficient to preclude arbitration.” *Id.* Here, the ACA contains no such statutory
administrative enforcement procedures, and so the failed arguments in *Gilmer* are even
more off-point here.

1 award after hearing. *See* OIA Report, p. ix. Further, the rules require arbitrators to follow
 2 the Ethics Standards set forth in the California Rules of Court and AAA Code of Ethics for
 3 Arbitrators in Commercial Disputes. OIA Rule 4. Finally, the neutral arbitrators on the
 4 OIA panel have plaintiff, defense, and judicial backgrounds. OIA Report, p. xiii.

5 *Second*, simply because many OIA cases involve medical malpractice, Plaintiffs
 6 suggest that OIA arbitrators are incompetent to decide statutory claims. But again, many
 7 of the OIA arbitrators are retired judges who certainly are no strangers to statutory law.
 8 Further, the Supreme Court in *Gilmer* rejected a similar argument, declining “to indulge
 9 the presumption that the . . . arbitral body conducting a proceeding will be unable or
 10 unwilling to retain competent, conscientious and impartial arbitrators.” *Gilmer*, 500 U.S.
 11 at 30-32; *see also, Hunter v. Kaiser Found. Health Plan, Inc.*, 434 F.Supp.3d 764, 779
 12 (N.D. Cal. 2020) (concluding that use of OIA arbitrators does not create an unconscionable
 13 advantage for Kaiser). Like the courts in *Gilmer* and *Hunter*, this Court should reject
 14 Plaintiffs’ unsubstantiated suggestions regarding bias.

15 *Third*, Plaintiffs claim that it is “unclear” whether injunctive or other equitable
 16 relief would be available in arbitration. But they fail to cite anything in their EOCs, their
 17 enrollment applications, or in the OIA rules precluding relief that would redress their
 18 individual claims—that is, an order that Kaiser cover their wheelchair claims without
 19 regard to the \$2,000 supplemental DME limitation. Because the agreements do not
 20 foreclose such individual relief, there is no basis to invalidate them on this ground. *See*
 21 *Hunter*, 434 F.Supp.3d at 778-79 (compelling arbitration based on similar Kaiser
 22 arbitration agreement).

23 Arbitration of public injunctive relief on the other hand—i.e., relief that would inure
 24 to the benefit of third parties—was not bargained for and Plaintiffs’ claims do not seek it
 25 here. Thus, like class arbitration (*see infra* at Section III), an arbitrator would not have the
 26 power to award public injunctive relief. The absence of public injunctive relief does not
 27 allow plaintiffs to escape their agreements to arbitrate individual claims. However, if the
 28 Court ultimately determines that Plaintiffs’ Section 1557 claim implicates public injunctive

1 relief, the Court should compel arbitration of Plaintiffs’ individual claims and stay
 2 litigation as to any public injunction claim pending completion of the arbitrations.

3 *Finally*, Plaintiffs argue that the arbitration agreement “prohibits” an award of
 4 attorney fees. Not so. The fee provision states, “*except as otherwise mandated by laws*
 5 *that apply to arbitrations under this ‘Binding Arbitration’ section, each party shall bear the*
 6 *party’s own attorneys’ fees*” (Espinal Decl. (ECF 32-2) Ex. B, p. 95; Ex. E, p. 265)
 7 (emphasis added). Therefore, to the extent Plaintiffs’ statutory claims allow recovery of
 8 attorney’s fees, that law will apply in the arbitration here. Further, even if the arbitration
 9 agreement prohibited a fee award—it doesn’t—that still would be no reason to invalidate
 10 the parties’ arbitration agreement. Instead, the proper remedy is to sever the fee provision
 11 but enforce the remainder of the agreement. *See Baker v. Acad. of Art Univ. Found.*, No.
 12 17-03444, 2017 WL 4418973, *5 (N.D. Cal. Oct. 5, 2017) (noting that California courts
 13 prefer to sever provisions rather than hold an entire agreement unenforceable); *Hunter*, 434
 14 F.Supp.3d at 776-779 (severing fee splitting provision in arbitration agreement); *Bigler v.*
 15 *Harker School*, 213 Cal.App.4th 727, 737-38, 741 (2013) (severing provision for
 16 attorney’s fees as requested by the defendant’s counsel because it was easily done pursuant
 17 to Cal. Civ. Code Section 1670.5); *Lang v. Skytap, Inc.*, 347 F.Supp.3d 420, 433-34 (N.D.
 18 Cal. 2018) (compelling arbitration and finding cost-splitting and fee provisions “easily
 19 severable”).

20 As even Plaintiffs concede, the U.S. Supreme Court has never invalidated an
 21 arbitration agreement on the ground that arbitration would not adequately protect the
 22 plaintiff’s statutory rights. (Opposition (ECF 37) at 12:8-9). Likewise here, Plaintiffs fail
 23 to show that arbitration is inadequate to fairly resolve their claims. The Court should
 24 accordingly enforce the parties’ agreements to arbitrate.

25 **B. The Arbitration Clause Is Not Unconscionable**

26 Plaintiffs’ unconscionability argument fares no better. To prevail on this argument,
 27 Plaintiffs must prove both procedural and substantive unconscionability. *See Kilgore v.*
 28 *KeyBank*, 718 F.3d 1052, 1058 (9th Cir. 2013) (“*Kilgore II*”). A court cannot “relieve

1 Plaintiffs of their contractual obligation to arbitrate by manufacturing unconscionability
 2 where there is none.” *Kilgore v. KeyBank, N.A.*, 673 F.3d 947, 964 (9th Cir. 2012)
 3 (“*Kilgore I*”), on reh’g en banc, *Kilgore II*, 718 F.3d 1052. “The party resisting arbitration
 4 bears the burden of proving unconscionability.” *Pinnacle Museum Tower Assoc. v.*
 5 *Pinnacle Market Dev. (US), LLC*, 55 Cal.4th 223, 247 (2012). Here Plaintiffs can prove
 6 neither procedural nor substantive unconscionability.

7 **1. The Arbitration Clause is Not Procedurally Unconscionable**

8 “Procedural unconscionability concerns the manner in which the contract was
 9 negotiated and the respective circumstances of the parties at that time, focusing on the
 10 level of oppression and surprise involved in the agreement.” *Chavarria v. Ralphs Grocery*
 11 *Co.*, 733 F.3d 916, 922 (9th Cir. 2013). There was no such oppression or surprise here.
 12 Both Plaintiffs had the opportunity to review their applications and the membership
 13 agreements at their leisure. They were not pressured to agree or forced to sign. Further, it
 14 is not true as Plaintiffs assert (Opposition (ECF 37) at 10:12-14) that Plaintiffs had no
 15 choice to avoid Kaiser’s arbitration clause. Plaintiffs could have enrolled with another
 16 health plan. For example, Mr. Rawlings’ enrollment form indicates that he could have
 17 chose a benefit plan with any one of seven other health plans (including Anthem Blue
 18 Cross, Health Net and United Healthcare). (Espinal Decl. (ECF 32-2) Ex. C, p. 162).

19 The arbitration provisions they signed were also conspicuous. They were clearly
 20 labeled in bold, separated from the rest of the enrollment application and are located
 21 directly above the signature lines. (Espinal Decl. (ECF 32-2) Ex. A, p. 7; Ex. C, p. 163).

22 Plaintiffs rely heavily on rhetoric—using loaded terms like “contract of
 23 adhesion”—but rhetoric is not enough. It is true that Plaintiffs did not individually
 24 negotiate their contracts, but that fact is true of most consumer contracts and yet has not
 25 prevented courts from routinely enforcing arbitration agreements in such contracts.

26 *Hunter* is on point. There, a Kaiser member enrolled in an individual (non-group)
 27 plan asked the court to void an arbitration agreement because she alleged her EOC was a
 28 contract of adhesion forced upon her by a more powerful party. *Hunter*, 434 F.Supp.3d at

1 775. The court rejected her argument, holding the amount of procedural unconscionability
 2 was low and she failed to demonstrate the high degree of substantive unconscionability
 3 required to prevent enforcement. *Id.* at 775-76. Here, Plaintiffs had greater bargaining
 4 power than the plaintiff in *Hunter*—Plaintiffs allege they enrolled through their employers,
 5 not individually through Covered California—and so the same result applies with even
 6 greater force. Likewise, *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951
 7 (1997), cited by Plaintiffs, actually supports Kaiser. There, even though the contract had
 8 some of the attributes of adhesion, the California Supreme Court concluded that it did not
 9 lack “minimum levels of integrity” and thus was not unconscionable. *Id.* at 985-86.

10 **2. The Arbitration Clause is Not Substantively Unconscionable**

11 Because the amount of procedural unconscionability—if any at all—is low,
 12 Plaintiffs must demonstrate a high degree of substantive unconscionability. *See Hunter*,
 13 434 F.Supp.3d at 776. “Substantive unconscionability pertains to the fairness of an
 14 agreement’s actual terms A contract term is not substantively unconscionable when it
 15 merely gives one side a greater benefit; rather the term must be so one-sided as to shock
 16 the conscience.” *Pinnacle*, 55 Cal.4th at 246; *see also, Chavarria*, 733 F.3d at 923 (“A
 17 contract is substantively unconscionable when it is unjustifiably one-sided to such an
 18 extent that it ‘shocks the conscience.’”); *Legnaioli v. Chrysler Capital, LLC*, No. 15-
 19 00744, 2015 U.S. Dist. LEXIS 182773, *10 (C.D. Cal. June 9, 2015) (applying the “shocks
 20 the conscience” standard in assessing substantive unconscionability); *Sanchez v. Valencia*
 21 *Holding Co., LLC*, 61 Cal. 4th 899, 917, 921, 922 (2015) (finding several arbitration terms
 22 not so one-sided as to be substantively unconscionable).

23 Here, the terms of the arbitration provisions are bilateral and fair. (Espinal Decl.
 24 (ECF 32-2) Ex. B, pp. 93-95; Ex. E, pp. 263-265). Plaintiffs fail to show that the
 25 arbitration terms are one-sided at all, much less so tilted as to “shock the conscience.”
 26 Instead, Plaintiffs repeat the same misplaced arguments they make against arbitration of
 27 their Section 1557 claim: namely, that OIA arbitrators are likely biased or incompetent,
 28 and that injunctive relief and attorney fees are unavailable. These arguments fail for the

1 same reasons discussed in Section II.A above. Therefore, like the court in *Hunter*, this
 2 Court should reject Plaintiffs’ similar contentions. *Hunter*, 434 F.Supp.3d at 779.

3 Plaintiffs citation to *OTO, LLC v. Kho*, 8 Cal.5th 111 (2019) does not support a
 4 different result. In *OTO*, the arbitration agreement required a claimant to give up certain
 5 administrative procedures for the recovery of unpaid wages. *Id.* at 122-23. Those
 6 procedures (called a Berman hearing) provide an informal forum for employees to bring
 7 their unpaid wage claims, significantly reducing the costs and risks of pursuing a wage
 8 claim in court. *Id.* The Court held that the arbitration agreement, which provided
 9 arbitration rules similar to litigating in court, was substantively unconscionable because
 10 employees who agree to arbitrate claims for unpaid wages are forced to forgo the
 11 economical administrative procedures to which they would otherwise be entitled. *Id.* at
 12 129-138 (recognizing that “cases have taken a different approach in evaluating the
 13 compelled arbitration of wage claims…”). Plaintiffs do not argue that the arbitration
 14 agreement deprives them of any more economical means of dispute resolution, so the
 15 rationale of *OTO* does not apply here.

16 **C. The Arbitration Clause Compels Arbitration of Plaintiffs’ ERISA Claim**

17 **1. The DOL Regulation Does Not Exempt Plaintiffs’ ERISA Claim From** 18 **Arbitration**

19 Plaintiffs do not dispute that ERISA claims can be subject to mandatory arbitration.
 20 *See Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1111-12 (9th Cir. 2019) (overruling
 21 *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984) and citing *Italian Colors*
 22 *Restaurant.*, 570 U.S. at 233, which held that “federal statutory claims are generally
 23 arbitrable and arbitrators can competently interpret and apply federal statutes[.]”). Instead,
 24 they narrowly base their challenge on the Department of Labor’s claim procedure
 25 regulation, 29 C.F.R. section 2560.503-1(c). Nothing in that regulation precludes
 26 arbitration of Plaintiffs’ ERISA claim.

27 The DOL regulation relates to the internal claims appeals procedures that a health
 28 plan makes available to members and which members must generally exhaust “before

1 challenging the [claims] decision under section 502(a) of the act or other applicable law.”
 2 29 C.F.R. § 2560.503-1(c)(4)(ii). Under the regulation, those internal appeal procedures
 3 may not include mandatory arbitration unless:

4 (i) The arbitration is conducted as one of the two appeals described in
 5 paragraph (c)(2) of this section and in accordance with the requirements
 applicable to such appeals; and

6 (ii) The claimant is not precluded from challenging the decision under
 7 section 502(a) of the Act or other applicable law.

8 29 C.F.R. § 2560.503-1(c). Plaintiffs interpret this language as a universal bar on
 9 arbitration of their Section 502(a)(3) claim and ask this Court to ignore on point authority
 10 from this district construing the regulation, in favor of two distinguishable unpublished
 11 district court cases from outside the Ninth Circuit.

12 The reasoning of *Sanzone-Ortiz v. Aetna Health of Cal., Inc.*, No. 15-03334, 2015
 13 WL 9303993 (N.D. Cal. Dec. 22, 2015) is sound, and the Court should not deviate from its
 14 holding. Like Plaintiffs here, the plaintiff in *Sanzone-Ortiz* challenged the “benefits cap”
 15 imposed by the plan contract on a particular category of coverage (namely, autism
 16 coverage). Like Plaintiffs here, the *Sanzone-Ortiz* plaintiff argued that the DOL regulation
 17 precluded arbitration of her claim challenging the plan’s benefits structure. The *Sanzone-*
 18 *Ortiz* court rejected this attempted evasion of the arbitration agreement. It concluded that a
 19 plain reading of the DOL regulation shows that its limitations apply only to a plan’s
 20 internal “claims procedures.” *Sanzone-Ortiz*, 2015 WL 9303993 at *3. In other words, the
 21 regulation only applies to “the administrative procedures a plan fiduciary uses when
 22 conducting its own review of a claim.” *Id.* at *2. The court reasoned that the plaintiff’s
 23 challenge to the plan’s benefits structure “[did] not directly concern the adverse benefits
 24 determination regarding her son’s [autism] therapy,” but instead raised a broader statutory
 25 challenge to the legality of the plan’s limitation on coverage. *Id.* at *3. Accordingly, the
 26 DOL regulation did not apply.

27 The same is true here. Plaintiffs’ complaint similarly does not directly concern an
 28 adverse benefits determination. For example, Plaintiffs’ are not arguing that Kaiser made

1 an incorrect finding about medical necessity or otherwise denied benefits that are in fact
 2 covered under their contracts. Indeed, Plaintiffs *admit* that their plans do not cover the
 3 benefits they seek through the complaint. (FAC ¶¶ 57-61). Rather than raising a claim for
 4 improper denial of benefits due, Plaintiffs here (like the plaintiff in *Sanzone-Ortiz*) raise a
 5 broad statutory challenge to Kaiser’s benefits structure, claiming that Kaiser plans
 6 uniformly fail to provide sufficiently-generous coverage for wheelchairs. The DOL
 7 regulation has nothing to do with a statutory challenge of this nature and thus does not
 8 permit Plaintiffs to evade their arbitration agreement.

9 The cases on which Plaintiffs rely—*Snyder v. Federal Insurance Co.*, No. 08-
 10 00153, 2009 WL 700708 (S.D. Ohio Mar. 13, 2009) and *Sosa v. PARCO Oilfield Services,*
 11 *Ltd.*, No. 05-00153, 2006 WL 2821882 (E.D. Tex. Sept. 27, 2006)—are not to the
 12 contrary. Unlike the statutory challenges Plaintiffs here raise, the plaintiffs in *Snyder* and
 13 *Sosa* were pursuing garden-variety non-statutory claims for the wrongful denial of benefits
 14 due under their plans—claims to which the DOL regulation did apply. *See Sanzone-Ortiz*,
 15 2015 WL 9303993 at *3 (discussing and distinguishing *Snyder* and *Sosa*).

16 **2. The Arbitration Agreement Does Not Exempt Plaintiffs’ ERISA Claim** 17 **from Arbitration**

18 Plaintiffs contend that the ERISA Section 502(a) claim is exempt from arbitration
 19 because Ms. Smith’s enrollment form excepts “claims subject to . . . the ERISA claims
 20 procedure regulation, and any other claims that cannot be subject to binding arbitration
 21 under governing law.” (Espinal Decl. (ECF 32-2) Ex. A, p. 7). But as Plaintiffs concede
 22 (Opposition (ECF 37) p. 19:18-19), this contractual exemption is co-extensive with the
 23 DOL regulation discussed in Section C.1 above and thus applies only to a plan’s internal
 24 administrative review of adverse benefits determinations, not to the statutory challenges to
 25 benefit structure that Plaintiffs raise. *See Sanzone-Ortiz*, 2015 WL 9303993 at *3.
 26 Accordingly, for the same reasons discussed in Section C.1, the contractual exemption in
 27 Ms. Smith’s enrollment form does not excuse her obligation to arbitrate (nor could it
 28

1 holding that a court may not compel class-wide arbitration when an agreement is silent
 2 about class arbitration. *Id.*; see also *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559
 3 U.S. 662, 685 (2010) (“An implicit agreement to authorize class-action arbitration,
 4 however, is not a term that the arbitrator may infer solely from the fact of the parties’
 5 agreement to arbitrate.”). In *Lamps Plus*, the Supreme Court explained that:

6 In individual arbitration, “parties forgo the procedural rigor and appellate
 7 review of the courts in order to realize the benefits of private dispute
 8 resolution: lower costs, greater efficiency and speed, and the ability to
 9 choose expert adjudicators to resolve specialized disputes.” [citation] Class
 arbitration lacks those benefits . . . Class arbitration . . . also raises serious
 due process concerns by adjudicating the rights of absent members of the
 plaintiff class . . .

10 Because of these “crucial differences” between individual and class
 11 arbitration, *Stolt-Nielsen* explained that there is “reason to doubt the parties’
 12 mutual consent to resolve disputes through classwide arbitration.” [citation]
 And for that reason, we held that courts may not infer consent to participate
 in class arbitration absent an affirmative “contractual basis for concluding
 that the party *agreed* to do so.”

13
 14 *Lamps Plus*, 139 S. Ct. at 1416 (citing *Stolt-Nielsen*, 559 U.S. at 684-87). *Lamps Plus* also
 15 noted that in California, an agreement is ambiguous “when it is capable of two or more
 16 constructions, both of which are reasonable.” *Id.* at 1414-15 (citing *Varela v. Lamps Plus,*
 17 *Inc.*, 701 Fed. Appx., 670, 672 (9th Cir. 2018)).

18 The arbitration agreement here does not speak to class arbitration at all, much less
 19 unambiguously reflect an agreement to arbitrate class claims. Plaintiffs argue that the
 20 agreement’s use of the term “any claim” implies an intention to allow class arbitration.
 21 But that is a strained construction of “any claim,” which in context indicates an agreement
 22 to arbitrate any claim that a given individual might bring; if the parties had meant to agree
 23 to class arbitration, that would be a strange and vague way to say it. In any event, at most
 24 Plaintiffs have identified an arguable ambiguity, but that is insufficient under *Lamps Plus*
 25 to supply the requisite intent. *Lamps Plus*, 139 S. Ct. at 1416; see also *Hunter*, 434
 26 F.Supp.3d at 780 (holding that there was “no clear provision for class-wide or group
 27 arbitration” in Kaiser arbitration agreement). Indeed, *Lamps Plus* is directly on point
 28 because the arbitration provision there extended to “any and all disputes claims or

1 controversies.” *Lamps Plus*, 139 S. Ct. at 1427 (Sotomayor, J., dissenting). Despite this
 2 language, which is materially identical to the “any claim” language here, the Supreme
 3 Court concluded that provision was ambiguous with regard to class arbitration. *Id.* at
 4 1416.

5 Plaintiffs’ authority does not compel a different result. *Oxford Health Plans LLC v.*
 6 *Sutter*, 569 U.S. 564 (2008), *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011),
 7 and *Southern Communs. Servs. v. Thomas*, 720 F.3d 1352 (11th Cir. 2013) were all
 8 decided before *Lamps Plus*. That alone is sufficient reason to disregard them. Further,
 9 those cases all arose in a different procedural context: namely, judicial review of an
 10 arbitrator’s decision that a claim was subject to arbitration. In that context, the reviewing
 11 court’s only task was to determine whether the arbitrators actually construed the arbitration
 12 contracts, *not* whether the arbitrators *correctly* did so. So long as the arbitrators were
 13 “arguably construing” the contracts, the courts had no power to overrule their
 14 determinations, even if they disagreed with them. *See Oxford Health Plans LLC*, 569 U.S.
 15 at 571-73; *Jock*, 646 F.3d at 122; *Southern Communs. Servs.*, 720 F.3d at 1359-60. Thus,
 16 none of those courts actually ruled that an arbitration provision impliedly authorized
 17 arbitration of class-wide issues.

18 IV.

19 THE COURT SHOULD STAY LITIGATION

20 This court should stay the litigation as to all arbitrable claims. *Alexander v.*
 21 *Anthony Int’l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003). Further, even if the court concludes
 22 that only one of Plaintiffs’ two claims is arbitrable, the court has discretion to stay the
 23 entire case pending resolution of the arbitrable claim. *U.S. for Use & Benefit of Newton v.*
 24 *Neumann Caribbean Int’l, Ltd.*, 750 F.2d 1422, 1427 (9th Cir. 1985) (affirming stay where
 25 trying non-arbitrable claim would duplicate effort). Similarly, if the court compels
 26 arbitration as one or both of the claims against Kaiser, this court may also stay this
 27
 28

1 litigation against DMHC. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 20, n.23 (1983)
 2 (court has discretion to stay litigation against non-arbitrating parties).³

3 Here, Plaintiffs' Section 1557 claim and ERISA claim involve similar and
 4 overlapping issues. Both claims address the extent of required coverage for wheelchairs
 5 and both require interpretation of state and federal law bearing on that issue, so concurrent
 6 litigation in separate forums would result in considerable duplication of effort and risk
 7 inconsistent outcomes. Similarly, the claims against the DMHC raise identical issues to
 8 the claims against Kaiser. The Court should accordingly stay litigation of the claims
 9 against the DMHC as well, because otherwise the Court would allow Plaintiffs to
 10 effectively avoid arbitration through the artifice of alleging identical claims against
 11 Kaiser's regulator. Thus, for the sake of judicial economy, to avoid inconsistent rulings,
 12 and to give force to Plaintiffs' agreement to arbitrate, this Court should stay the litigation
 13 as a whole pending completion of the arbitration.

14
 15 Dated: March 25, 2022

16 By

/s/ A. Alexander Kuljis

17 MOE KESHAVARZI
 18 JOHN T. BROOKS
 19 A. ALEXANDER KULJIS
 Attorneys for Defendant
 KAISER FOUNDATION HEALTH PLAN, INC.

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 28 ³ If the CAA applies—it does not—the Court retains discretion to issue a total stay of the
 litigation. Cal. Code Civ. Proc. § 1281.4.